IN THE SUPREME COURT
OF THE STATE OF MISSOURI

NO. SC83719

DAVID BRIZENDINE,

Plaintiff/Respondent,

vs.

NORA LEE CONRAD,

Defendant/Appellant.

SUBSTITUTE BRIEF OF APPELLANT NORA LEE CONRAD

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JURISDICTIONAL STATEMENT

In the action below, Conrad filed a Motion for Judgment on the Pleadings raising the issue of the Liquidated Damages provision precluding an award of additional damages in the litigation. (R. Vol. I, p. 036-059). Brizendine filed Suggestions in Opposition (R.Vol. I, p. 060-65). The Trial Court then heard, and overruled, Defendant's Motion for Judgment on the Pleadings on August 2, 1999. (R.Vol. I, p. 135) (Docket Sheet).

On November 5, 1999, Brizendine dismissed all claims and counts of his Petition, with the exception of Count III, Action for Waste, pursuant to R.S.Mo. 537.420, 537.480 and 537.490 (1994). (R.Vol. I, p. 069). The case was tried to the Court on December 3, 1999, on the single count claiming statutory waste, and Conrad's Counterclaim. On January 3, 2000, the trial court entered judgment for Brizendine and awarded statutory waste damages of $11,253.45, trebled to $33,760.35, all pursuant to RSMO. §537.420. (R. Vol. I, p. 182-183). The Trial court also found for Brizendine on Conrad's Counterclaim. The Amended Judgment became final on February 2, 2000. Conrad timely filed her Notice of Appeal on February 11, 2000. (R. Vol. I, p. 187). Conrad appeals from that Judgment and rulings of the Trial Court.

This case does not involve the validity of treaty or statute of the United States or of a statute or provision of the Constitution of this state, the construction of the revenue laws of this state, the title to any state office, or a case where the punishment imposed is death, and so fell within the general appellate jurisdiction

of the Court of Appeals, Western District of Missouri, under Article V, Section 3 of the Constitution of the State of Missouri. Jurisdiction was in the Western District. RSMO. § 477.070 (1994).

The Missouri Court of Appeals, Western District, entered its opinion is this case on April 10, 2001, reversing the decision of the Trial Court. *Brizendine v. Conrad*, -- S.W.3d --, 2001 WL 339471 (Mo. App. W.D. April 10, 2001). This Court entered its Order transferring the cause to the Missouri Supreme Court on August 21, 2001, pursuant to M.R.C.P. 83.06.

STATEMENT OF FACTS

Plaintiff David Brizendine ("Brizendine") and Defendant Nora Lee Conrad ("Conrad") entered into a Lease Purchase Agreement dated September 30, 1997 for the Lease and/or Purchase of a 10 unit low income apartment/office complex located at 301-303 Ash, Jefferson City, Cole County, Missouri (the "Property"). The Property is located eight blocks east of the central business district of Jefferson City, Missouri.

The Lease Purchase Agreement, in general terms, contemplated a twelve month lease of the Property, with a sale of the Property to be concluded on September 30, 1998. The lease term began on October 1, 1997 and expired on September 30, 1998.

The Lease/Purchase Agreement contained the following provisions relative to the Lease and the Purchase of the Property:

3. The Lessee covenants and agrees:

…

(b) To use the premises as residential and commercial rental property and for no other purpose unless written consent of the Lessor is first obtained.

(c) To maintain in good condition all interior and exterior surfaces and to do all interior decorating and maintenance at her own expense. It is agreed that all costs for maintenance and repair of the premises and mechanical apparatus located thereon (including replacement) shall be borne by the Lessee during the term of this Agreement. After execution, all costs of maintenance shall be at the Lessee's expense. …

(f) If for any reason Lessee fails to purchase the property, she agrees to surrender it to Lessor in the same condition as received, ordinary wear and tear excepted. …

14. In the event Lessor shall perform his part of this agreement or shall tender performance thereof, and Lessee fail to perform her part, then the sum of Fifteen Thousand Dollars ($15,000) paid herewith shall be retained by Lessor as liquidated damages, it being agreed that actual damages are difficult, if not impossible to ascertain. However, Lessor reserves the right to seek specific performance of this agreement.

(R. Vol. I, p. 101-105) (Plaintiff's Exhibit 3 at Trial) (Appendix, p. A1-A5).

The Lease Purchase Agreement contained, in paragraph 14, a Liquidated Damages Clause providing that, if Conrad did not perform any obligation under the Agreement, the sum of $15,000 "shall be retained by Lessor as liquidated damages." The Liquidated Damage Clause provided for damages upon Conrad's failure to perform any obligation and made no distinction between leasing obligations and purchase obligations. The Lease Purchase Agreement was drafted by Brizendine's attorneys. (R.Vol. II, p. 208) (Trial Transcript, p. 51).

Conrad took possession of the Property on October 1, 1997 under the Lease Purchase Agreement. Several days prior to the scheduled closing on the Property, Conrad advised Brizendine that she did not desire to go through with the transaction. (R. Vol. II, p. 199) (Trial Transcript, p. 13). These facts do not appear to be in dispute.

Conrad testified that Brizendine offered to take the property back at the time she told him she was not going to buy the property. (R. Vol. II, p. 230) (Trial Transcript, p. 140). Brizendine testified that he told Conrad that he would take the property back only if it was in as good a condition as he gave it to her. (R. Vol. II, p. 199) (Trial Transcript, p. 13). Conrad tendered possession of the Property back to Brizendine in October of 1999. (R. Vol. I, p. 231) (Trial Transcript, p. 142-143). Brizendine refused to take possession of the Property until January 1, 2000. Id. Brizendine retained the $15,000 dollars paid by Conrad. (R. Vol. II, pp. 208-209) (Trial Transcript, pp. 52-53).

Brizendine filed this action. The initial Petition contained three counts:

Count I, Specific Performance; Count II, Petition for Damages; and Count III, Petition for Rent. (R. Vol. I, pp. 1-11). Brizendine then filed a First Amended Petition containing four counts: Count I, Damages in Lieu of Specific Performance; Count II, Petition for Rent; Count III, Action for Waste; and Count IV, Petition in Quasi Contract. (R. Vol. I, pp. 39-52). Conrad filed an Answer (R. Vol. I, pp. 29-35) and Counterclaim. (R. Vol. I, pp. 12-17). Conrad asserted that Brizendine accepted the $15,000.00 as liquidated damages precluding any claims regarding the purchase or lease of the premises, including damages for waste. Conrad contended that Brizendine had breached the contract by failing to comply with various provisions therein. Conrad also raised Brizendine's acceptance of the $15,000 as election of his remedy and full payment of any damages claimed in the Amended Petition. (R. Vol. I, pages 30-34)(Answer to Plaintiff's First Amended Petition).

Conrad filed a Motion for Judgment on the Pleadings raising the issue of the Liquidated Damages provision precluding an award of additional damages in the litigation. (R. Vol. I, p. 036-059). Brizendine filed Suggestions in Opposition (R.Vol. I, p. 060-65). The Trial Court then heard, and overruled, Defendant's Motion for Judgment on the Pleadings on August 2, 1999. (R.Vol. I, p. 135) (Docket Sheet).

On November 5, 1999, Brizendine dismissed all claims and counts of his Petition, with the exception of Count III, Action for Waste, pursuant to R.S.Mo. 537.420, 537.480 and 537.490 (1994). (R.Vol. I, p. 069). The case was tried to

the Court on December 3, 1999, on the single count claiming statutory waste, and Conrad's Counterclaim. On January 3, 2000, the trial court entered judgment for Brizendine and awarded statutory waste damages of $11,253.45, trebled to $33,760.35, all pursuant to RSMO. §537.420. (R. Vol. I, p. 182-183). The Trial court also found for Brizendine on Conrad's Counterclaim. The Amended Judgment became final on February 2, 2000. Conrad timely filed her Notice of Appeal on February 11, 2000. (R. Vol. I, p. 187).

POINTS RELIED ON

1. **The Trial court erred in denying Conrad's Motion for Judgment on the Pleadings and in awarding Brizendine statutory waste damages pursuant to RSMO. § 537.420 in the amount of $33,760.35 because the award is against the weight of the evidence, and the Trial Court erroneously applied the law, in that the Lease Purchase Agreement contained a valid and enforceable Liquidated Damages provision, which precluded a separate award for statutory waste damages.**

Brown v. Brown, 19 S.W.3d 717, (Mo. App. W.D. 2000)

Disabled Veterans Trust v. Porterfield Construction, Inc., 996 S.W.2d 548, 552 (Mo. App. W.D. 1999)

Germany v. Nelson, 677 S.W.2d 386, 388 (Mo. App. 1984)

Paragon Group, Inc. v. Ampleman, 878 S.W.2d 878, 881 (Mo. App. E.D. 1994)

Warstler v. Cibrian, 859 S.W.2d 162, 165 (Mo. App. W.D. 1993)

R.S.. §537.420 (2000)

2. The Trial Court erred in denying Conrad's Motion for Judgment on the Pleadings and in awarding Brizendine statutory waste damages pursuant to RSMO. § 537.420 in the amount of $33,760.35 because the award is against the weight of the evidence, and the Trial Court erroneously applied the law, in that RSMO § 537.420 does not sanction or authorize a double recovery by allowing Brizendine to rely on the liquidated damage provision of the Lease Purchase Agreement to retain $15,000 for Conrad's breach and then obtain statutory damages for the same breach.

Hawkins v. Foster, 897 S.W.2d 80, 86 (Mo. App. S.D. 1995)

Brown v. Brown, 19 S.W. 3d 717 (Mo. App. W.D. 2000)

Rudnitski v. Seely, 452 N.W. 2d 664 (Minn. 1990)

Warstler v. Cibrian, 859 S.W.2d 162, 165 (Mo. App. W.D. 1993)

Inauen Packaging Equipment Corporation v. Integrated Industrial Services, Inc., 970 S.W.2d. 360, 368 (Mo. App. W.D. 1998)

Brizendine v. *Conrad*, 2001 WL 339471 (Mo. App. April 10, 2001)

Harris v. Desisto, 932 S.W.2d 435, 447 (Mo. App. W.D.1996)

Sanfillipo v. Oehler, 869 S.W.2d 159 (Mo. App. E.D. 1993)

Disabled Veterans Trust v. Porterfield Construction, Inc., 996 S.W.2d 548, 552 (Mo. App. W.D. 1999)

R.S. §537.420 (2000)

ARGUMENT

1. The Trial court erred in denying Conrad's Motion for Judgment on the Pleadings and in awarding Brizendine statutory waste damages pursuant to RSMO. § 537.420 in the amount of $33,760.35 because the award is against the weight of the evidence, and the Trial Court erroneously applied the law, in that the Lease Purchase Agreement contained a valid and enforceable Liquidated Damages provision, which precluded a separate award for statutory waste damages.

A. Standard of Review.

In a court tried case, "the judgment of the trial court will be affirmed on appeal unless there is no substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law." *Brown v. Brown, 19 S.W. 3d 717 (Mo. App. W.D. 2000).*

B. The Liquidated Damages Provision in Paragraph 14 of the Lease Purchase Agreement Provided for Damages upon Conrad's Failure to Perform any Obligation Under the Lease Purchase Agreement.

The Lease Purchase Agreement was drafted by the attorneys for Brizendine. (R. Vol. II, p. 208) (Trial Transcript, p. 51). The Agreement contained

the following language, which is directly relevant to the issue of whether or not Brizendine contracted to limit his damages for waste from Conrad:

> 3. The Lessee covenants and agrees:
>
> …
>
> a. To use the premises as residential and commercial rental property and for no other purpose unless written consent of the Lessor is first obtained.
>
> b. To maintain in good condition all interior and exterior surfaces and to do all interior decorating and maintenance at her own expense. It is agreed that all costs for maintenance and repair of the premises and mechanical apparatus located thereon (including replacement) shall be borne by the Lessee during the term of this Agreement. After execution, all costs of maintenance shall be at the Lessee's expense. …
>
> f. If for any reason Lessee fails to purchase the property, she agrees to surrender it to Lessor in the same condition as received, ordinary wear and tear excepted. …
>
> 14. In the event Lessor shall perform his part of this agreement or shall tender performance thereof, and Lessee fail to perform her part, then the sum of Fifteen Thousand Dollars ($15,000) paid herewith shall be retained by Lessor as liquidated damages, it being agreed that actual damages are difficult, if not impossible to ascertain.

However, Lessor reserves the right to seek specific performance of this agreement.

(R. Vol. I, p. 101-105) (Plaintiff's Exhibit 3 at Trial) (Appendix, p. A1-A5).

The Agreement was drafted by Brizendine and, therefore, must be construed against him. *Disabled Veterans Trust v. Porterfield Construction, Inc.*, 996 S.W.2d 548, 552 (Mo. App. W.D. 1999). In the Agreement, the parties agreed to a Liquidated Damage provision. That provision limited Brizendine's damages to $15,000 in the event that Conrad failed to perform any of the obligations under the Agreement. Brizendine subsequently argued that Conrad failed to perform the obligation to purchase the property under the lease and that she failed to perform the obligation to surrender the property in the same condition as received. In satisfaction thereof, Brizendine retained the $15,000 paid by Conrad.

In the proceedings below, Brizendine made the argument that the Agreement was, in effect, two separate agreements, one an agreement to purchase and one an agreement to lease. Brizendine then argued that the liquidated damages provision was applicable to the agreement to purchase only. In an effort to avoid the consequences of his agreement to the liquidated damages, he then proceeded to trial on a waste claim, rather than breach of contract for Conrad's alleged failure to surrender the property in the same condition as received. Brizendine may not avoid the contractual agreements he drafted by abandoning his contract cause of action, attempting to then proceed to trial on a statutory tort

theory, and yet retaining the benefit of the abandoned contract remedy by keeping the liquidated damages for waste.

The entire agreement to lease and to purchase is tied into one single document. Numerous provisions of the Lease Purchase Agreement mix together concepts of the Lease and the Purchase. For example, paragraph 3(f) provides that, if Conrad does not purchase the property, "she agrees to surrender it to Lessor in the same condition as received, ordinary wear and tear excepted." (R. Vol. I., p. 102) (Plaintiff's Exhibit 3 at Trial). Thus, if Conrad does not purchase the Property, she is making an affirmative agreement to return the property to Brizendine, without damage above "ordinary wear and tear." This agreement is directly tied to the failure to purchase the Property.

The Lease Purchase Agreement then provides in the Liquidated Damages Clause, paragraph 14, that:

> In the event Lessor shall perform his part of this agreement or shall tender performance thereof, and Lessee fail to perform her part, then the sum of Fifteen Thousand Dollars ($15,000) paid herewith shall be retained by Lessor as liquidated damages, it being agreed that actual damages are difficult, if not impossible to ascertain. However, Lessor reserves the right to seek specific performance of this agreement. (emphasis added).

Paragraph 14 provides that, if Conrad does not perform "her part" of "this agreement," "then the sum of Fifteen Thousand Dollars ($15,000) paid herewith shall be retained by Lessor as liquidated damages, it being agreed that actual

damages are difficult, if not impossible to ascertain." The "agreement" referred to in Paragraph 14 is the Lease Purchase Agreement in its entirety, not just the provisions relative to the purchase. Even if paragraph 14 were construed to relate only to the purchase of the Property, paragraph 3(g) ties the obligation not to commit waste directly back to the failure to purchase the Property. "An ambiguity exists in a written instrument such as this lease, only if, in reading the lease as a whole, it is reasonably susceptible to different constructions." *Disabled Veterans Trust,* 996 S.W.2d at 552.

The bottom line is that Brizendine and Conrad included a liquidated damage provision in their Lease Purchase Agreement. The terms of the Agreement, drafted by Brizendine, are clear and provide that: "if Lessee fail to perform her part, then the sum of Fifteen Thousand Dollars ($15,000) paid herewith shall be retained by Lessor as liquidated damages, it being agreed that actual damages are difficult, if not impossible to ascertain." (R. Vol. I, p. 101-105) (Plaintiff's Exhibit 3 at Trial). That provision covers damages for the failure to purchase the Property, as well as any damages for waste.

C. Brizendine Cannot Retain the $15,000 as Liquidated Damages and Receive Damages for Waste Pursuant to RSMO. §537.420.

"Liquidated and actual damages generally may not be awarded as compensation for the same injury." *Warstler v. Cibrian*, 859 S.W.2d 162, 165 (Mo. App. W.D. 1993) (*citing Germany v. Nelson*, 677 S.W.2d 386, 388 (Mo. App. 1984)). When the parties have specifically stipulated as to the amount of

liquidated damages, the liquidated damages replace any actual damages incurred and liability for breach is limited to the amount of liquidated damages agreed to. *Id*. Brizendine and Conrad specifically agreed to $15,000 as the amount of damage that Brizendine would be entitled to if Conrad breached any provision of the Lease Purchase Agreement. Brizendine accepted the $15,000 as liquidated damages for all obligations of Conrad relative to the Lease Purchase Agreement, including any claim of damages for waste. If Brizendine wanted to exclude waste damages from the operation of the liquidated damages clause, he could have easily formulated the language of the Lease Purchase Agreement to exclude damages for waste or repair from the operation of the liquidated damage clause. *Disabled Veterans Trust*, 996 S.W.2d at 552. He did not.

Missouri courts have consistently held that actual damages in real estate breach of contract cases are "uncertain and difficult to prove." *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 881 (Mo. App. E.D. 1994). "Like real estate contracts, it is difficult to measure damages upon breach of a lease by the tenant." Id. The liquidated damage clause found in paragraph 14 of the Lease Purchase Agreement is valid and enforceable. Brizendine accepted and retained the $15,000 as his sole remedy. The Trial court erred in awarding him statutory waste damages where Brizendine elected his remedy by retaining the $15,000 as waste damages, and then attempted to get a second bite of the apple by proceeding on a statutory waste theory.

2. **The Trial Court erred in denying Conrad's Motion for Judgment on the Pleadings and in awarding Brizendine statutory waste damages pursuant to RSMO. § 537.420 in the amount of $33,760.35 because the award is against the weight of the evidence, and the Trial Court erroneously applied the law, in that RSMO § 537.420 does not sanction or authorize a double recovery by allowing Brizendine to rely on the liquidated damage provision of the Lease Purchase Agreement to retain $15,000 for Conrad's breach and then obtain statutory damages for the same breach.**

Brizendine, in the Court of Appeals, essentially argued that he should be allowed to have his cake, and eat it too. Brizendine argued that the "lease purchase agreement contains no waiver of any of the waste statutes …." (Respondent's Brief, p. 9). Brizendine then goes on to state that it is "nonsensical to think a tenant could repudiate a contract, then in reliance on that very repudiated contract, be allowed to commit waste," citing *Hawkins v. Foster*, 897 S.W.2d 80, 86 (Mo. App. S.D. 1995). Id. [1] Conrad believes that it is more

[1] Brizendine's reliance on *Hawkins* is misplaced in that the vendee in *Hawkins* failed to pay the $1,000 dollar deposit required under the liquidated damages provision of the contract. The *Hawkins* court held that the failure to pay the $1,000 was a breach by the vendee and prevented him from relying on the $1,000

nonsensical to keep $15,000 dollars under a liquidated damages clause contained in a contract, and then argue that the same clause is unenforceable. Conrad is simply arguing that Brizendine's retention of the $15,000 under paragraph 14 of the Lease Purchase Agreement precludes an award of waste damages under RSMO. § 537.420 because Brizendine elected to take the $15,000 as his damages, which clearly encompassed "waste" damages, under the terms of the contract he drafted.

A. Standard of Review.

In a court tried case, "the judgment of the trial court will be affirmed on appeal unless there is no substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law." *Brown v. Brown*, 19 S.W.3d (Mo. App. W.D. 2000).

B. The Inclusion of an Express Prohibition Against Waste in the Lease Purchase Agreement Acts to Bar a Separate Statutory Recovery of Damages for Waste When Brizendine Retained the $15,000 as Liquidated Damages under the Lease Purchase Agreement.

Brizendine's attorneys specifically included an obligation against waste by Conrad in the Lease Purchase Agreement. Paragraph 3(f) of the Lease Purchase Agreement states: "If for any reason Lessee fails to purchase the property, she

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as a limitation of damages. Conrad paid the $15,000 dollars anticipated under the Lease Purchase Agreement.

agrees to surrender it to Lessor in the same condition as received, ordinary wear and tear excepted." (R. Vol. I, p. 102) (Plaintiff's Exhibit 3 at Trial) (Appendix, p. A-2). Thus, the Lease Purchase Agreement drafted by Brizendine specifically set forth that waste[2] by Conrad would be a breach of the Agreement. If Brizendine is allowed to retain the $15,000 dollars under the Lease Purchase Agreement, and then sue for waste damages, it is an impermissible double recovery.

In an analogous situation involving a contract for deed, "[i]nclusion in a contract for deed of an express prohibition against waste or a liquidated damage clause mentioning waste would bar a vendor's recovery after cancellation." *Rudnitski v. Seely*, 452 N.W. 2d 664 (Minn. 1990). *Rudnitski* involved a situation where the vendor had entered into a contract for deed with a vendee. The vendee had taken possession of the premises and made payments of approximately $46,500 towards the purchase price of $176,000. *Rudnitski*, 452 N.W. 2d at 665.

The contract for deed contained a liquidated damages clause that stated:

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[2] At trial (and to the present), Conrad vigorously denied that she committed waste on the premises. In fact, these premises involved sub-leases to tenants for low-income housing. Brizendine admitted that, in some instances, the apartments would not need much work in terms of clean up and repair. In other instances, it would take he and his mother a full week to clean and repair the apartment. (R.Vol. II, pp. 204-207) (Trial Transcript, pp. 35-47).

> But should default be made in the payment of principal *** [respondents] may, at her option, by written notice declare this contract cancelled and terminated, and all rights, title and interest acquired thereunder by [appellant] shall thereupon cease and terminate, and all improvements made upon the premises, and all payments made hereunder shall belong to said party of the first part as liquidated damages for breach of this contract ***.

Rudnitski, 452 N.W. 2d at 666.

The vendee failed to make an installment payment that was due, failed to pay insurance, and failed to pay real estate taxes, and the vendor began statutory proceedings to cancel the contract. *Id*. After the vendor re-took possession of the property, and retained approximately $46,500 in principal payments, he claimed to discover waste damages and attempted to commence a second proceeding the recover waste and other damages for conversion. *Id*., n. 3.

The *Rudnitski* court determined that the inclusion "of an express prohibition against waste or a liquidated damage clause mentioning waste would bar a vendor's recovery after cancellation." *Id*. "In such case, waste constitutes a breach of the contract and cancellation would terminate any existing right to recover for the breach." *Id*.

That is exactly the situation presented here. The claimed waste of Conrad would constitute a breach of an express provision of the Lease Purchase Agreement, paragraph 3(f). Brizendine, relying on Conrad's claimed breach of the

agreement, and waste, retained the $15,000 dollars. Brizendine cannot retain the $15,000 and then seek damages under RSMO. § 537.420. This is particularly true since Brizendine now states that the liquidated damages provision in the Lease Purchase Agreement was unenforceable, and he dismissed any claims under the Lease Purchase Agreement prior to trial. Respondent's Brief, p. 15.[3]

[3] Brizendine claimed below that because he "retained the right to enforce the contract via specific performance, therefore, the liquidated damage is void as a penalty." Assuming this position to be true, and assuming that Brizendine can separately sue for waste damages pursuant to RSMO. § 537.420, the $15,000 he retained must be offset against any recovery by Brizendine for statutory waste because he has wrongfully retained the $15,000 under an admittedly unenforceable provision in the contract. Alternatively, assuming the liquidated damages clause to be valid and enforceable, and assuming Brizendine's election of remedies and retention of the $15,000 does not preclude his pursuit of a statutory waste claim pursuant to RSMO. § 537.420, the $15,000 must be offset against any damages awarded because the $15,000 covers waste damages. Any other result clearly causes Brizendine to be allowed to double recover for waste damages. The Court of Appeals in this case correctly held that paragraph 14 of the Lease Purchase Agreement was an enforceable liquidated damages clause that applied equally to the lease and purchase provisions of the agreement between the parties.

1). Brizendine's Retention of the $15,000, and an Award of Statutory Waste Damages, Constitutes an Impermissible Double Recovery.

Brizendine realized the problem with the liquidated damages clause and dismissed all counts of his Petition, except the action for statutory waste, prior to trial. This was a direct effort to avoid the operation of the liquidated damages clause. The $15,000 retained by Brizendine represents damages for the claimed breach of the purchase agreement, and for the breach of the specific obligation not to commit waste in paragraph 3(f) of the Lease Purchase Agreement. If the liquidated damages provision is now somehow deemed unenforceable, Brizendine's retention of those funds would constitute an impermissible double recovery and allow Brizendine to be unjustly enriched by retention of funds under an unenforceable provision of a contract. *See Inauen Packaging Equipment Corporation v. Integrated Industrial Services, Inc.*, 970 S.W.2d. 360, 368 (Mo. App. W.D. 1998); *Warstler v. Cibrian*, 859 S.W.2d 162, 165 (Mo. App. W.D. 1993).

This also constituted an election of remedies where Brizendine is seeking the benefits of rescission by retaining the liquidated damages for Conrad's claimed breach, and then seeking damages for waste, a duty arising under the same

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Brizendine v. Conrad, -- S.W.3d --, 2001 WL 339471 at p. 6 (Mo. App. W.D. April 10, 2001).

contract. "Obviously, one cannot seek damages under the contract, yet seek the benefits of rescission." *Harris v. Desisto*, 932 S.W.2d 435, 447 (Mo. App. W.D.1996)."This is the rationale of requiring an election of remedies, to prevent a double satisfaction or recovery." *Id*. (*citation omitted*).

The fact that Brizendine sought waste damages does not avoid this conclusion. The key is the fact that the $15,000 dollars represented liquidated damages for all breaches under the agreement, including waste damages, not just the failure to purchase. Brizendine cannot retain the $15,000, and then obtain statutory damages for waste on top of the $15,000. Brizendine elected his remedy by retaining the $15,000. This $15,000 represented compensation for any claim of breach under the Lease Purchase Agreement. He cannot also recover statutory waste damages for the same injuries encompassed by the liquidated damages clause and retained by him.

"[I]f a party sues for breach of duty prescribed by law as an incident of the relation or status which the parties created by their agreement, the action may be one in tort, even though the breach of duty may also be a violation of the terms of the contract." *State ex. rel. Cummins Missouri Diesel Sales Corporation v. Eversole*, 332 S.W.2d 53, 58 (1960). This is apparently the basis for Brizendine's argument that he is entitled to keep the $15,000 as contract damages, and then sue under a tort theory. However, Brizendine's reasoning falls far short of the mark. "In such a case, the party has a choice whether to proceed in tort for violation of the duty imposed by law, or by n action on the contract for breach of the

contractual obligation." *Id.* Brizendine made his choice by electing to keep the $15,000.00 pursuant to the terms of the contract he drafted rather than proceeding against Conrad for statutory waste damages. His decision to keep the $15,000 now precludes him from pursuing a separate statutory tort cause of action. *Id.*

C. The Lease and Purchase Agreements are not Severable and Divisible.

Brizendine claimed, in the Court of Appeals, that the decision in *Sanfillipo v. Oehler*, 869 S.W.2d 159 (Mo. App. E.D. 1993), stands for the proposition that, because the Lease Purchase Agreement "sets out separate subjects with separate acts of performance and consideration," .. "the purchase contract is severable and divisible from the lease contract." (Respondent's Brief, p. 16). Respondent's reliance on *Sanfillipo* is misplaced.

The *Sanfillipo* case actually demonstrates exactly how Brizendine could have avoided the arguments Conrad now makes by drafting separate agreements relating to the Lease and the Purchase. In *Sanfillipo*, the parties entered into two separate contracts. One contract was an "Asset Purchase Agreement" which was conditioned on the execution of a second "Employment and Non-Competition Agreement." *Id.* Thus, *Sanfillipo* involved two separate legal documents. The court held:

> In the instant case, it is clear that the "employment agreement and the non-competition agreement are independent. Each is supported by separate consideration, the employment contract could be

> terminated upon ninety days notice of either party, and the termination by either party would not relieve defendant from his payment obligations under the non-competition agreement.

Id. at 161.

The Lease Agreement and the Purchase Agreement could have been drafted as two separate agreements. Why Brizendine chose to merge the two transactions together in one document is unclear. If the Purchase Agreement was completely separate from the Lease Agreement, there would be no room for argument that the waste damages were included in liquidated damages clause. The responsibility for any ambiguity must be charged to Brizendine. *Disabled Veterans Trust,* 996 S.W.2d at 552.

D. The $15,000 Cannot Be Construed as an Offer.

Brizendine also argued below that the $15,000 dollars was an "offer" which "offers no real damages to Landlord (Brizendine) at all." (Respondent's Brief, p. 14). It is difficult to understand Brizendine's argument. Brizendine appears to be arguing that the $15,000 is not liquidated damages, but is "an offer to extend credit against the purchase price of $140,000 in the amount of the payment received for Landlord's agreement to enter into the lease and to delay the closing date for Tenant's benefit." *Id.* Brizendine then points to paragraph 5 of the Lease Purchase Agreement as support for the proposition that the $15,000 is merely a credit against the purchase price, "as an enticement to Tenant's performance which in case of untimely performance could be rejected." *Id*.

If you follow Brizendine's argument to its logical conclusion, Conrad paid $15,000 dollars toward the purchase price of the apartment building. Then, when Conrad did not go through with the purchase, Brizendine gets to keep the $15,000. If it looks like a liquidated damages clause, acts like a liquidated damages clause, and smells like a liquidated damages clause, it is a liquidated damages clause. Brizendine obviously believed that the $15,000 dollars represented liquidated damages, because he kept it.

"The term 'liquidated damages' refers to "that amount which, at the time of contracting, the parties agree shall be payable in the case of breach." *Warstler v. Cibrian*, 859 S.W.2d 162, 164 (Mo. App. W.D. 1993). Brizendine used the liquidated damage provision, and its enforceability as a sword to keep the $15,000, and now wishes to use its non-enforceability as a shield to avoid its true legal effect. Brizendine cannot have it both ways. If Brizendine is allowed to retain the $15,000 as liquidated damages which includes compensation for waste damages under the contract, and then seek separate damages for waste under a statutory tort theory, he will have been impermissibly awarded actual damages and liquidated damages for the same injury. *Warstler*, 859 S.W. 2d at 165. This is simply not allowed under the law of the State of Missouri.

E. If the Liquidated Damages Clause is Determined to be Unenforceable, the $15,000 Must be Offset Against the $33,760.35 Awarded to Brizendine by the Trial Court Because Brizendine Elected the Remedy of Rescission.

In the event this Court determines that the Liquidated Damages Clause is unenforceable, Conrad asserts that the $15,000 dollars must be offset against the total award of $33,760.35. *Warstler*, 859 S.W.2d at 165; *Harris*, 932 S.W.2d at 447; *See Inauen*, 970 S.W.2d. at 368. Any other result is unconscionable under the circumstances and facts of this case.

CONCLUSION

The Trial Court erred in allowing Brizendine to proceed to Trial on a statutory waste theory. Brizendine legally contracted to limit his damages for waste against Conrad to the liquidated damage amount of $15,000. Brizendine then elected his remedy between contract and tort by keeping the $15,000 as damages under the contract, which included damages for waste as contemplated by the contract itself. The Liquidated Damage Provision contained in paragraph 14 of the Lease Purchase Agreement purported to compensate Brizendine for all breaches under the agreement, including the specific obligation not to commit waste found in paragraph 3(f). Brizendine elected his contractual remedy and accepted the $15,000 as the sum total of his damages, including any damages for waste. Brizendine then impermissibly attempted to double dip by seeking statutory waste damages pursuant to RSMO. § 537.420. Brizendine cannot have it both ways, and the $15,000 represents full compensation for all breaches of the agreement, including any claim of waste. This election by Brizendine precluded him from seeking a second recovery for statutory waste which covers the same item of damage: **waste**. Finally, if this Court concludes that the Liquidated

Damages Clause is somehow unenforceable, the $15,000 retained by Brizendine must be applied to offset the statutory waste damages awarded by the Trial Court.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I, Lee R. Hardee III, the undersigned, do hereby certify that the Substitute Brief of Appellant Nora Lee Conrad includes the information required by 55.01; and complies with the limitations contained in Special Rule No. 1(b). The undersigned certifies that the number of words contained in the Substitute Brief is 5, 797.

_____
Lee R. Hardee III MO.#40991

CERTIFICATE OF MAILING

The undersigned hereby certifies that two copies of the above and foregoing document were mailed, postage pre-paid, this _____ day of _____, 2001, to the following:

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_____

APPENDIX